90-1054

DOCKET NO._____

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 19____

IN RE JESSIE D. MCDONALD,

PETITIONER

ON APPLICATION FOR EXTRAORDINARY RELIEF

TO THE TENNESSEE SUPREME COURT

PETITION FOR WRIT OF MANDAMUS, PROHIBITION

FOR THE PETITIONER

Jessie D. McDonald, Pro se
P.O. Box 80724
2134-14th. Ave. North
Nashville, Tenn. 37208
(615) 256-3434

REASONS FOR EXTRAORDINARY RELIEF

This application is being presented, in aid of this court's appellate jurisdiction and there are present, exceptional circumstances warranting the exercise of this court's discretiorary powers, because:

(1) The Tennessee Supreme Court refused to exercise its appellate jurisdiction on direct review, by Petition to Review the actions of the trial judge, to deny McDonald the right to an appeal, as a matter of right, by depauperizing him, after the appeal had been approved by the clerk of the court, pursuant to Rule 18, of Tennessee Rules of Appellate Procedure; and in the absence of a remand order from the Court of Appeals;

(2) The Tennessee Supreme Court usurped its jurisdiction, by delegating powers

to the clerk of the court, to conduct hearings on applications for leave to proceed in forma pauperis;

(3) The Tennessee Supreme Court abused its discretion, by singling McDonald out from all of the citizens of Davidson County, and State of Tennessee and refusing to exercise its appellate jurisdiction to hear applications for leave to appeal in forma pauperis;

(4) The Tennessee Supreme Court abused its discretion and usurped its powers,by singling McDonald out from all of the Tennessee citizens and ordering him to pay approximately $6,000.00 in court cost, because of his unsucess in previous litigations, for the past twenty(20)years, that were initiated under the pauperis oath;

(5) The Tennessee Supreme Court refused to exercise its appellate jurisdiction,to review the judgments of the lower courts, by directing the clerk of the court, not to accept any pleadings for filing, by McDonald, which are accompanied by a pauperis oath;

(6) The Tennessee Supreme Court abused its discretion, by directing the clerk of the court, and lower court judges, to place the burden on McDonald, to prove that he is in fact, a pauper, when there has never been an allegation that the pauperis oath was based on false statements; even when McDonald stated under oath, that he had not earned enough revenue, to file an income tax return, within the last two(2) years;

(7) The Tennessee Supreme Court has refused to exercise its appellate jurisdiction, to render a decision on the appeal, as a matter of right from the lower courts, based solely on the fact he[1] is a pauper and is without funds to post an appeals bond; and the said court has singled McDonald out from all of the citizens in Tennessee, to act in violation of Tennessee law, to inquire into the affidavit insupport of the motion for leave to appeal in forma pauperis;

Therefore, it is clear that adequate relief cannot be had in any other form or from any other court.

---

[1] McDonald;

QUESTIONS PRESENTED FOR REVIEW

1. Whether due process requires a hearing on applications for leave to proceed in forma pauperis, to be conducted by a judge, rather than a clerk of the court ?

2. Whether the state supreme court has powers to delegate powers to the clerk of the court, to hear legal proceedings that is addressed to the court ?

3. Whether the state supreme court abused its discretion, by singling out McDonald from all other citizens in Tennessee, because of his many legal proceedings and directing the clerk of the court to conduct a hearing on matters that were directed to the court, when that procedure has never been applied to any other citizen ?

4. Whether the state supreme court abused its discretion, by ordering McDonald to pay approximately $6,000.00 in court cost, for legal proceedings that were initiated and disposed of over twenty (20) years ago, and all were initiated under the pauperis oath, after McDonald stated under oath, that he has not earned enough money within the last two(2) years, to file an income tax return with the Internal Revenue Service, and none of the defendants, interested parties, nor courts has alleged that the affidavits in support of the motions for leave, were based on fraud, or any false statements ?

5. Whether the burden is on McDonald to proved that he is a pauper, after he has submitted a sworn affidavit, indicating that he has no property or money and

stated under oath that he has not earned enough revenue within the last two (2) years, to file a federal income tax report to the Internal Revenue Service ?

6. Whether due process permits the state supreme court to create special proceedings that is applicable to only McDonald ?

7. Whether public officials, such as judges, clerks and prosecuting attorneys are liable to the injured party, in their official and individual capacities for arbitrarily depriving any citizen of the state wherein he may reside, and citizens of the United States, of their federal protected rights to due process and equal protection under the law ?

8. Whether the previous judgment of this Court, under Docket No. 88-5890 has

invited evil actions by the state supreme court ?

YELLOW CAB METRO, INC.

9. Whether Yellow Cab Metro entered into this lawsuit with unclean hands ?

10. Whether the name 'YELLOW CAB', is within the trade name protection boundary in the Nashville and Davidson County area?

11. Whether McDonald is a proper party to this lawsuit, in his individual capacity, where the actions in the complaint are alleged to be that of the corporation, or McDonald's actions as a driver for the Yellow Cab Co., Inc. ?

12. Whether there is a cause of action in a trade name dispute, when the complaint failed to allege fraud, deception, or the palming off effect ?

13. Whether the Yellow Cab Metro is falsely advertising, by placing their name on the side of their cabs, with 'Yellow Cab' being printed in large size print, but 'Metro,Inc', being printed in a much smaller size of print, which cannot be seen at a distance ?

14. Whether Yellow Cab Metro is falsely advertising with South Central Bell Telephone Company, under the name 'Yellow Cab' when its business name is Yellow Cab Metro ,Inc.?

15. Whether McDonald has a right to enter into Davidson County, to conduct business under the Yellow Cab franchise of Franklin and Spring Hill, Tennessee ?

16. Whether there is a valid judgment in the lawsuit against the Yellow Cab Co., Inc. of Williamson County, by the Davidson

County Chancery Court ?

17. Whether the trial in the Chancery Court against McDonald, conducted in a fair and impartial manner ?

18. Whether the state supreme court abused its discretion, in refusing to hear the appeal from the Chancery Court, in Case No. 87-76-I ?

19. Whether the clerk of the state supreme court can refuse to accept any pleadings that are presented under the pauperis oath ?

SOUTH CENTRAL BELL Telephone

20.Whether a plaintiff is entitled to injunctive relief against a party, that has directed injuries towards another,but in the process of doing so, has caused injuries to individuals, other than those directly involved ?

21. Whether the plaintiff can recover damages from a defendant, for loss of potential income, where the defendant has directed its actions against another , but the plaintiff has suffered and deprived of income because of the wrongful act ?

22. Whether the chancellor abused his discretion, by refusing to grant a motion to compel an answer in discovery proceedings, when the defendant failed to respond in writing, or to appear at the hearing of the motion ?

23. Whether the judge erred by refusing to issue a temporary injunction against South Central Bell, when they failed to respond in writing or to appear at the hearing on the motion, after being given notice of the application and of the hearing ?

STATE OF TENNESSEE

24. Whether a convicted felon can seek a declaratory judgment, after the expiration of the sentence, to have a circuit court determine his legal rights,status and other legal relations ?

25. Whether the state supreme court abused its discretion, by refusing to hear the application for writ of certiorari from the dismissal of the application for declaratory judgment ?

26. Whether the conviction against McDonald, on the charge,'Obtaining Property by False Pretense', is void, as a matter of law ?

27. Whether a state can refuse to allow a second application for post conviction relief , when the judgment is defective ?

28. Whether due process of law allows a state to pick and chose which lawsuits will be permitted to proceed in forma pauperis, under TCA,§20-12-127 ?

29. Whether due process permits a state to refuse relief in criminal proceedings, to indigent applicants filing pro se, solely on procedure defaults ?

30. Whether prosecuting attorneys has a duty to defendants in criminal prosecutions, to protect their rights to due process of law, while acting on behalf of the state ?

RESPONDENTS TO PETITION

The following individuals are listed as respondents, in their offical capacity as set out below:

1. Hon. Lyle Reid, Chief Justice of the Tennessee Supreme Court;

2. Hon. Frank F. Drowota,Associate Judge of the Tennessee Supreme Court;

3. Hon. H. O'Brien, Associate Judge of the Tennessee Supreme Court;

4. Hon. Martha C. Daughtrey, Associate Judge of the Tennessee Supreme Court;

5. Hon. E.Riley Anderson, Associate Judge of the Tennessee Supreme Court;

6. Hon. A.B. Neil, Clerk of the Tennessee Supreme Court.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

FEDERAL RULES AND STATUTE

TENNESSEE RULES AND STATUTE

FEDERAL CONSTITUTION

TENNESSEE CONSTITUTION

TABLE OF AUTHORITIES CONT.

CASE AUTHORITIES

Case Authorites Cont.

OPINIONS BELOW

October 9th., 1990, Memorandum of the Clerk of the Tennessee Supreme Court, denying the application for leave to proceed on appeal in forma pauperis;

March 23rd., 1990, Order of the state supreme court, delegating powers to the clerk of the court; and ordering the payment of approximately $6,000.00 in court costs;

August 27th., 1990, Order of the trial court denying leave to appeal in forma pauperis, against Yellow Cab Metro,Inc.;

July 10th.,1990, Final Order, granting Summary Judgment to Yellow Cab Metro,Inc.;

July 13th., 1990, Order, denying the application for declaratory judgment against the State of Tennessee;

OPINIONS BELOW-CONTINUE

December 28th.,1987, final judgment entered in the trial court in Case No.87-76-1 against Yellow Cab Metro,Inc.;

March 22,1988, Order depauperizing McDonald, in the trial court;

July 3rd.,1990, Order denying Motion to compel and Injunctive Relief against South Central Bell Telephone Company, (SCB,hereinafter).

July 24th., 1990, Order denying Declaratory Judgment in criminal conviction;

May 13th.,1975, Judgment and Opinion of the Court of Criminal Appeals, in the criminal conviction;

January 19,1976, Opinion of the State Supreme Court, in the criminal conviction;

March 15,1976, Opinion on Motion to Rehear;

OPINION OF THIS COURT

February 21, 1989, Order denying McDonald of the privilege of seeking extraordinary relief under the pauperis oath.

GROUNDS FOR REVIEW

The Tennessee Supreme Court has acted arbitrarily to single out McDonald and imposed special standards and requirements for him to follow, which are not applicable to other citizens in Tennessee, by being required to post a surety bond in proceedings seeking extraordinary relief, and being required to appear at a hearing before the clerk of the court, to prove that he is a pauper;

The Tennessee Supreme Court has denied McDonald of the right to an appeal of the trial court's judgment, based solely on the fact, he is a pauper and is unable to post an appeals bond of $750.00, which is

approximately fifty (50) percent more than that which is asked of other citizens of Tennessee;

The Tennessee Supreme Court has usurped its jurisdiction by ordering the clerk of the court to conduct a hearing to determine whether McDonald is a pauper within the requirements of the state law, upon the affidavit that was submitted in support of his Motion for Leave, when the state law forbids the state supreme court from such conduct;

The Tennessee Supreme Court has usurped its jurisdiction, by ordering the clerk of the court to exercise his discretion, when the state law forbids him from doing so, and expressly states that his duties are ministerial in character;

The date of the judgment was entered on October 9th., 1990, which this review is being sought.

STATUTORY PROVISION

This Court has jurisdiction under 28,U.S.C.,§1651(a), to grant extraordinary relief.

CONSTITUTIONAL PROVISIONS

Fourteenth Amendment to U.S. Constitution

Section 1:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. **No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.**

TENNESSEE STATE CONSTITUTION

Article 1, Section 22:

NO PERPETUITIES OR MONOPOLIES

That perpetuities and monopolies are contrary to the genius of a free state, and shall not be allowed.

STATEMENT OF THE CASE

This case involves three seperate cases which came to the appellate court at the same time and were heard at a special hearing before the clerk of the court,at the same time, but the facts in each case are set out seperately, as shown more clearly, as follows.

However, in accord with Rule 14.1(h) of this Court Rules, the Petitioner, McDonald brings this Court's attention to the fact, that he has not had a chance to present the federal question to any other forum, since this is the only court that has appellate jurisdiction over the state supreme court, which has refused to exercise its appellate jurisdiction. The federal questions was initially presented to the trial courts at first instance, and was denied.

YELLOW CAB METRO, INC.

This matter was initiated by the Yellow Cab Metro, Inc., filing its lawsuit in the Davidson County Chancery Court, at Nashville, Tennessee, under Docket No. 87-76-I against the Yellow Cab Co., Inc. of Williamson County, Tennessee (presently named, Yellow Cab Co., Inc. of Nashville and Franklin), McDonald Enterprises and Jessie D. McDonald, individually and doing business as Yellow Cab Co., Inc., by causing the service of process to be conducted and served at McDonald's home, which is located in Nashville and Davidson County. There is no office or business location in the Nashville and Davidson County area for the Yellow Cab Co., Inc., and to this date, the Yellow Cab Co., Inc. has never been served with process, either in Maury or Williamson County, Tennessee.

The complaint alleged confusion in the names 'Yellow Cab Metro,Inc., and the Yellow Cab Co.,Inc., and requested the chancery court to enjoin McDonald from using the name Yellow Cab Co.,Inc. in the Nashville and Davidson County area.

The proof at the trial, showed that the Yellow Cab Metro,Inc. were responding to calls in the Williamson County area,where McDonald's Yellow Cabs are licensed.

The chancery court, after conducting a hearing before the date of the trial, granted McDonald the right to file his cross-complaint against the Yellow Cab Metro,Inc., which was based on libel and slanderous statements made by stockholders ,and employees of the Yellow Cab Metro, under the pauperis oath.

At the conclusion of the proof, by the Yellow Cab Metro, McDonald moved the court for a direct verdict, but before the court rendered a decision on the motion, the chancellor called the attorney of record and McDonald to the bench, and advised McDonald, that if he was unsuccessful with the motion for direct verdict, he would not be given an opportunity to put on any proof. McDonald then withdrew his motion and began calling his witnesses, on the cross-complaint. One of the witnesses, Sgt. Peeler, of the Capitol Police Department completed his testimony, which verified each allegation in the cross-complaint,but the chancellor refused to allow the other witnesses to testify.

When McDonald was not allowed to call other witnesses, his proof ended, then the attorney for Yellow Cab Metro, moved

the court for a direct verdict against McDonald, which was granted by the trial judge.

Upon the case being submitted to the jury, the attorney for Yellow Cab Metro was allowed to include the words, fraud, deception in his argument, when the complaint did not allege such words, but McDonald was not allowed to include the words'racially motivated' in his argument, because his response or answer did not allege such words.

The attorney of record was allowed to present special written instructions to the jury, as well as interrogatories, but McDonald was not allowed to do so, even though they were submitted to the clerk, on a date before the trial, as was required by the courts instructions.

The jury rendered a verdict in favor of the Yellow Cab Metro,Inc., but indicated that they had suffered no injuries to justify damages. The trial judge entered an order, in accord with the jury verdict, and issued a permanent injunction against all of the defendant, enjoining them from responding to calls in the Nashville and Davidson County area. The jury verdict was given on the 17th., day of December,1987, but the written order was not rendered until December 28th., 1987.

However, the Notice of Appeal, with pauperis oath, was approved by the clerk, on December 17th., 1987, before the final order was entered in the case, pursuant to Rule 18,T.R.A.P.

On March 22nd., 1988 (nearly 90 days later), the trial court depauperized McDonald, after the appeal had been filed.

McDonald filed his complaint in the Second Circuit Court, seeking injunctive relief and damages against the Yellow Cab Metro,Inc. for wrongfully suing him in his individual capacity, for the actions of the Yellow Cab Co.,Inc; which was dismissed, and the Motion for Leave to Appeal in forma pauperis was denied, after McDonald was unable to prove that he was a pauper.

McDonald filed his Notice of Appeal in the trial court clerk's office. A Petition for Review was submitted to the clerk's office of the Court of Appeals, with a second Motion for Leave, with affidavit in support of the application for leave to appeal in forma pauperis, which resulted in the Memorandum of the Clerk, dated October 9th., 1990.

SOUTH CENTRAL BELL

This lawsuit was initiated under the pauperis oath, in the City of Franklin, by McDonald, under Docket No. 19901, in the Chancery Court for Williamson County, where the Yellow Cab Co.,Inc. is authorized to operate.

McDonald is seeking injunctive relief and damages against South Central Bell (SCB hereinafter) and the complaint alleges that, even though the wrongful actions of SCB are directed towards the Yellow Cab Co.,Inc., McDonald's ability to earn an income is directly affected, because of the SCB deviating from the regular and normal procedure of giving out the numbers through the directory assistance, in the Nashville and Davidson County area.

The complaint alleged that the directory assistance respond to the public, when asked for the telephone number for'Yellow Cab Co.', or 'Yellow Cab', by asking which location, and proceed to give the Yellow Cab Metro,Inc. as one of the locations, when it is not a location of the Yellow Cab Co.,Inc.; they further allowed the Yellow Cab Metro,Inc. to obtain an alternate listing as 'Yellow Cab', when the name was already being used by McDonald's family owned business, as Yellow Cab Co., Inc., however, when the public requests the number for the Yellow Cab Metro,Inc., SCB do not offer the number for the Yellow Cab Co.,Inc., but proceed to give the number for the Yellow Cab Metro,Inc.; The complaint further alleged telephone harrassment by SCB through its employees and placing unlawful monitoring and other

unauthorized equipment on the lines that are used by McDonald, in the lawful operations of the Yellow Cab Co., Inc.;

McDonald submitted interrogatories to SCB for an answer, which they refused, by not responding to the request.

McDonald moved the trial court for a temporary injunction and an order to compel SCB to file an answer to the pleadings. SCB failed or refused to submit a written response to the motions, and also failed to appear at the hearing to oppose the motions, but the chancellor denied the motions, which resulted in the interlocutory appeal, by Petition to Review, and the Memorandum by the clerk of the state supreme court being issued.

STATE OF TENNESSEE

This matter involved a criminal conviction against McDonald, near January of 1973, in Division III, of Davidson County Criminal Court, on the charge, 'Obtaining Property Under False Pretense', whereas the indictment alleged that the Defendant, McDonald provided false information to the clerk, to obtain a 'Title', to a 1972 Ford,LTD automobile.

This matter was tried before a jury of lawful men and women, and upon a conclusion of the trial, the jury rendered a verdict against McDonald, and recommended the minimum sentence of three (3) years confinement in the Tennessee State Penitentiary.

On direct appeal, the Court of Criminal Appeals reversed the conviction, on other grounds, but stated in dictum,that:

> " Upon the record there can be no doubt that the trial court was confused as to whether the defendant was charged with obtaining credit by false pretenses and as to whether the credit union's property mentioned in the indictment referred to the automobile."

However, upon the appellate court rendering its opinion, the state filed its application for certiorari in the state supreme court, on the issues that was used to grant the reversal. The state supreme court responded after granting certiorari, by stating:

> " We granted certiorari in this case to consider the single question of whether the reliance of the victim upon the false representation or pretense is necessary to sustain a conviction under Section 39-1901, T.C.A.".

The court continued by further stating, "we respond in the negative", and proceeded to reverse the judgment of the appellate court and reinstated the judgment of the

trial court. The sentence of three years has long since expired, in May of 1979.

McDonald filed his application for a Declaratory Judgment in the Circuit Court of Davidson County, Tennessee, under the pauperis oath, requesting that court to determine his legal rights, status and other legal relations, with respect to the judgment of the appellate court, which stated that McDonald had been convicted of a crime, that was not charged in the indictment. Prior to that application, the courts in Tennessee had consistently denied applications for post conviction relief and habeas corpus relief and when a previous application has been denied for post-conviction relief, there is no second chance to apply for the post conviction relief.

The circuit court dismissed the application for declaratory judgment, without conducting a hearing on the.merits.

A Petition for Writ of Certiorari was submitted to the clerk of the Tennessee Supreme Court, with a Motion for Leave to Proceed in Forma Pauperis, and affidavit in support of the motion was attached thereto.

The state supreme court refused to execised its appellate jurisdiction.

REASONS WHY THE WRIT SHOULD BE GRANTED

The law in Tennessee is clear and is very liberal in allowing appeals in forma pauperis. The Code, it is true, in its terms, seems to contemplate only the institution of a suit in this form; but it provided that either party to an action at law in the circuit court, could, at the time at which final judgment was rendered, pray an appeal in the nature of a writ of error to the supreme court. **Heatherly** v. **Bridges**, 48 Tenn.(1 Heisk) 220 (1870), see **§20-12-127,T.C.A.**; The object of the law as to actions in forma pauperis, was to place the weak on a level with the strong, in a contest for their rights in the court of justice. **Barber** v. **Denning**, 36 Tenn. (4 Sneed) 267 (1856); **Andrews** v. **Page**, 49 Tenn. (2 Heisk) 634 (1870). The duties prescribed by the Acts

of 1821, Chapter 22, to the several clerks of record in this state, are not judicial, but simply ministerial, and if a party chooses to take and subscribe the oath required by that act, the clerk have no discretion to exercise in granting or refusing the oath for which he applies. **Morris** v. **Smith**, 1 Tenn. Cas.(Shannon) 27 (1849); and **Snyder** v. **Summers,** 69 Tenn. (1 Lea) 481 (1878). Taking the oath prescribed for poor persons in case of appeal and tendering it to the clerk, although he refuses to accept it, is a substantial compliance with the requirements of the law, and the appeal is thereby perfected. **State** v. **Gannaway**, 84 Tenn. (16 Lea) 124 (1855). The pauperis oath statute for Tennessee only deprives non-residents of the state of the benefit of taking the pauper's oath and does not otherwise effect the general law. **Hilliard**

v. **Stark**, 82 Tenn. (14 Lea) 9 (1884) and permanent residents of the state are entitled to the benefits of the statute. **In re Curtis**, 6 Tenn. Civ. App. (Higgins) 12 (1915). There has never been a Motion to Depauperize McDonald, filed with the state supreme court, but even if it had, the state supreme court is without powers or jurisdiction to pass on such a motion. **In re Holiday's Estate**, 180 Tenn. 646, 177 S.W. 2d 826(1944). Therefore, it is clear that the state supreme court usurped its powers to issue an order to the clerk of the supreme court, delegating him the powers to conduct a hearing on the application for leave to proceed on appeal, in forma pauperis. The power to inquire into the truthfulness of a pauper's oath belongs to the trial court, and must be invoked

therein or the appeal will be treated as regularly taken. **Dunn** v. **Moore**, 22 Tenn. App. 412, 123 S.W. 2d 1095 (1938); **Perry** v. **Carter**, 188 Tenn. 409, 219 S.W. 2d 905 (1949). It is clear that an appellate court cannot inquire into the sufficiency of an appeals bond or the truthfulness of an oath in lieu thereof. **Locke** v. **Smith Funeral Ser. Corp.**, 180 Tenn. 18, 171 S.W. 2d 272 (1942).

In the matter against Yellow Cab Metro, the Notice of Appeal was filed on December 17th., 1987, which was approved by the clerk of the court on that date. The trial court did not depauperize McDonald, until March 22nd.,1988 (nearly 90 days later), after the appeal had been perfected. It is clear that, although the trial court alone has the authority to inquire into the truthfulness of pauper's oath, executed in

lieu of an appeals bond, the court must do so within thirty (30) days from the entry upon the minutes of the decree from which the appeal is taken. See supra, **Locke v. Smith Funeral Ser. Corp., in** the case at bar, the trial court did not depaurize McDonald within the time allowed. The law in Tennessee is clear that, where the appellant perfected his appeal to the court of appeals by filing the prescribed pauper's oath, in lieu of an appeals bond, in compliance with the judgment and no question of his right to so appeal was raised in the trial court, the motion to dismiss the suit on the ground that no valid appeals bond had been executed could not be made for the first time on appeal. **Pettry v. Carter**, 188 Tenn. 409, 219 S.W. 2d 905 (1949). When the circuit court denied McDonald's Motion for Leave

to appeal in forma pauperis, which was in compliance with the statutory requirements, the state supreme court refused to exercise its appellate jurisdiction, by refusing to hear the appeal. The United States Court of Appeals for the Sixth Circuit has clearly stated that, denial of forma pauperis is an appealable order. **Foster** v. **U.S.**, C.A., Ohio, 1965, 344 F.2d 698.

CONCLUSION

There can be no dispute, that McDonald, in fact, perfected his appeal, by pauper's oath, in lieu of an appeals bond, within the allowed time for an appeal. It is also clear that the appellate courts in Tennessee has refused to exercise its appellate jurisdiction. In the interest of protecting the rights of McDonald, to an appeal, as a matter of right, review must be provided by some

legal forum, which has appellate jurisdiction over the Tennessee Courts, and this is the only court that has such authority.

It is clear that the actions of the state supreme court is patterned from a previous judgment of this court, with the exception of a more extreme measure, which is by design, deprived McDonald from all appeals, including extraordinary proceedings as well.

In the dissenting opinion of this Court, in Case No. 88-5890, Mr. Justice Brennen, with whom Mr. Justice Marshall, Mr. Justice Blackmun and Mr. Justice Stevens joined, recognized the potential evils, which are discussed herein. The actions of the clerk of the Tennessee Supreme Court, not only deprived McDonald of access to the courts on applications for extraordinary relief, but of all appellate rights, based solely

on the fact, McDonald is a pauper and is unable to pay the costs of an appeals bond. It is likewise clear that the state supreme court usurped its powers and jurisdiction, by issuing an order to the clerk, instructing him to do that, which he has no discretion, and the state supreme court has no jurisdiction over.

RELIEF SOUGHT

For the foregoing reasons, the Petitioner, Jessie D. McDonald, pray this Court for relief as follows:

1. Grant this application for extraordinary relief; and issue orders to the clerk of the courts below, to certify the records in the cases before this court, and to transfer them to the clerk's office of this court;

2. Amend the previous judgment of this

court, which rendered on February 23rd., 1989, under Docket No. 88-5890,reinstating McDonald's privileges under Rule 46. 4 of the Rules of the United states Supreme Court; and;

3. Issue an Order, allowing the brief on the merits, with joint appendix to be filed with the clerk of this court;

4. All other and further relief this Court deems proper; which include the respondents reimbursing McDonald for the cost of this application for extraordinary relief.

This being the 30th., day of October, 1990.

Respectfully submitted,

Jessie D. McDonald

Jessie D. McDonald

AFFIDAVIT OF SERVICE

I, Jessie D. McDonald, after first being duly sworn to, in accord with the laws of Tennessee, states that on this 15th., day of November,1990 a copy of the attached Petition for Extraordinary Relief, was served upon the respondents, by depositing the same in the U.S. Mail, with the proper first class postage affixed thereon and addressed to:(1) Hon. Lyle Reid, C.J.; (2) Hon. Frank F. Drowota, J.; (3) Hon. H. O'Brien, J.; (4) Hon. Martha C. Daughtrey, J.; (5) Hon. E. Riley Anderson, J.; and Hon. A.B. Neil, Clerk, and all of the Tennessee Supreme Court, and were addressed to 100 Supreme Court Bldg., Nashville, Tennessee 37219.

I further state that a copy was also served upon the attorneys of record, on the same date, in the same manner as above, as follows: Derry Harper, Attorney for SCB,356 Green Hills Office Bldg., Nashville, Tenn. 37215;

Richard E. Norman,Jr., Attorney for YCM, 4220 Nolensville Rd., Nashville, Tennessee 37211; and (3) Debra K. Inglis, Assistant Attorney General for Tennessee, 450 James Robertson Pkwy., Nashville, Tennessee 37243-0485 ; and Charles Burson, Attorney General[1]

This being the 15th., day of November, 1990.

Jessie D. McDonald

Jessie D. McDonald,Pro se
P.O. Box 80724
2134-14th. Ave. North
Nashville, Tennessee 37208
(615) 256-3434

STATE OF TENNESSEE)
COUNTY OF DAVIDSON)

Before me, on the above date, after first being duly sworn to, in accord with the laws of Tennessee.

Susan P. Barbee

Notary Public

My Commission Expires: **May 8th., 1991**

[1] Same address as Debra K. Inglis.

APPENDIX

INDEX TO APPENDIX

INDEX TO APPENDIX Cont.

Pages

CLERK OF THE SUPREME COURT OF TENNESSEE

Jessie D. McDonald, Appellant, vs. Yellow Cab Metro, Inc., Appellee;	**FILED**: Oct.9th.,1990 DAVIDSON LAW Harry Lester, Judge
Jessie D. McDonald, Appellant, vs. South Central Bell Telephone Co., Appellee;	WILLIAMSON COUNTY
Jessie D. McDonald, Appellant, vs. State of Tennessee, Appellee.	DAVIDSON LAW Matthew J.Sweeney, III, Judge

MEMORANDUM

By prior Order of the Supreme Court of the State of Tennessee, this office was directed to not receive any further application for appeal until this office held an

evidentiary hearing as to whether or not the applicant, Jessie D. McDonald, could do so in forma pauperis. The appeals enumerated above were perfected by the appellant from the various courts listed and accordingly I conducted a hearing to satisfy the directions of the Court. These hearings were held on August 31, 1990, and were conducted according to the Tennessee Rules of Appellate Procedure.

The hearings were transcribed by a court reporter and are filed in this office.

At the outset I was of the opinion that it was incumbent upon the appellant to establish the fact that he was permitted to appeal in forma pauperis and that the burden of establishing the same was upon him. He appeared in person without counsel and offered no testimony other than affidavits which he had filed in support of his position.

He was thereafter subjected to extensive examination by attorneys representing the various appellees. He was advised that the case of **Jessie D. McDonald vs South Central Bell Telephone Company,Inc.**, as well as **Yellow Cab Metro,Inc**., had had orders entered by the trial judges hearing these causes, that he was denied the right to appeal in forma pauperis. No findings were submitted by the respective trial judges, but I conclude that under the appropriate rules of appellate procedure that the same were presumed to be correct. No such entry was made in the case of **Jessie D. McDonald vs. State of Tennessee**.

Based upon the evidence aduced from the appellant and the exhibits introduced, I find as follows:

Mr. McDonald did not demonstrate to me from all of the evidence that he was not

capable of executing the normal bond required of all appellants. The evidence conclusively showed that he was entirely able to purchase gasoline for the operation of his taxi, was capable of securing credit for the repair of his taxi, and was able from time to time to secure unsecured loans for himself for such purchases as was needed by him. The appellant refused to answer a number of questions which I was of the opinion were material to the issue for determination. No substantial reason was given by him for such refusal to answer.

For all of the foregoing, I find that as of this date, Mr. McDonald should be denied the right to perfect the foregoing appeals without first making adequate bond as required by other appellants seeking the same relief.

Respectfully submitted,
A.B. NEIL, Clerk

IN THE SUPREME COURT OF TENNESSEE, AT NASHVILLE

JESSIE D. MCDONALD, Petitioner-Appellant,	)	
v.	)	**FILED:**
YELLOW CAB METRO,INC., Respondent-Appellee.	)	March 23, 1989

ORDER

On March 9, 1989, the Court of Appeals entered an order directing the clerk to file this appeal in the Supreme Court. On March 14, 1989, the Appellant, Jessie D. McDonald, pro se, moved this court to suspend the enforcement of a judgment, rendered by the Chancery Court of Davidson County, in case no. 87-76-I, Yellow Cab Metro,Inc. v. Jessie D. McDonald, et. al, which is the basis for the present lawsuit brought in the Circuit Court of Davidson

County. Appellant avers that the Chancery Court lacked subject matter jurisdiction to enter the judgment and the judgment is void, as a matter of law, since it was obtained through fraud. In the Circuit Court suit petitioner sought injunctive relief to enjoin the execution of a permanent injunction, issued by Chancellor Irvin H. Kilcrease in case no. 87-76-I. Judge Matthew J. Sweeney,III, by Order entered December 21,1988, dismissed all claims asserted by Plaintiff McDonald, with prejudice. It is from this Order that Plaintiff Appellant McDonald appeals.

On pages 34-36 of the record on appeal we find an Order entered March 22,1988,by Chancellor Kilcrease, in Case No. 87-76-I, found in minute Book 268, page 26, in the Chancery Court for Davidson County. In the Chancery Court suit, which is the basis

for this present suit and appeal, Chancellor Kilcrease denied McDonald's motion for leave to appeal in forma pauperis. McDonald was required to file a bond for costs of the appeal. The Chancellor found: "Defendant McDonald is not unable to bear the costs of appeal, he id unwilling to bear such costs."

Jessie McDonald is no stranger to the United States Supreme Court and is no stranger to the appellate courts of this state. On February 21, 1989, the United States Supreme Court, in re Jessie D. McDonald, Petitioner, 109 Supreme Court 993(1989), directed the Clerk of that Court "not to accept any further petitions from petitioner for extraordinary writs . . . unless he pays the docketing fee. . . ." The Court stated:

> " Every paper filed with the Clerk of this Court, no matter how repetitious or frivolous, requires some portion of

> "the institution's limited resources. A part of the Court's responsibility is to see that these resources are allocated in a wat that promotes the interests of justice. The continual processing of petitioner's frivolous requests for extraordinary writs does not promote that end. Although we have not done so previously, lower courts have issued orders intended to curb serious abuses by persons proceeding in forma pauperis. Our order here prevents petitioner from proceeding in forma pauperis when seeking extra-ordinary writs from the court."

Jessie McDonald has continually abused his right to file appeals in the appellate courts without payment of court costs. His court costs in the appellate courts of this state are presently in excess of $6,000.00.

Based upon the record in this cause,which includes the Order of Chancellor Kilcrease in which he found that appellant "is unwilling to bear such costs,: the Clerk of this Court is directed not to accept any further pleadings from Jessie McDonald in this appeal until proper bond for costs

has been made. Petitioner's appeal will be dismissed unless a proper bond is made with the clerk of this Court within (30) days. This Court will take no action on appellant's "Motion to Suspend Enforcement of the Judgment," until bond is made.

The Clerk is further directed that all appeals filed in the appellate courts of this state must be accompanied by a bond to secure the costs unless proper proof of indigency, satisfactory to the Clerk, is submitted in lieu of such bond. The Clerk is empowered to hold any necessary evidentiary hearings to determine the sufficiency of such bond or proof of indigency.

Jessie McDonald is further ordered to make satisfactory arrangements with the clerk of this court to make payment of the accrued costs owed the State of Tennessee.

This the 23rd day of March, 1989.

PER CURIAM

IN THE SECOND CIRCUIT COURT FOR DAVIDSON COUNTY, AT NASHVILLE, TENNESSEE

JESSIE D. MCDONALD, Plaintiff,	)	
vs.	)	No. 90C-1853
YELLOW CAB METRO,INC., Defendant.	)	

ORDER DENYING FORMA PAUPERIS

This matter came before the court,upon McDonald's Motion for Leave to Appeal the final decision of this Court, to the Court of Appeals, in forma pauperis.

Upon considering the pleadings that were submitted to the Court, and hearing testimony by McDonald, it is the opinion of this Court, that the said motion is not well taken, and the matter should be and is hereby denied.

This being the 27th., day of August,1990.

HARRY S. LESTER, Judge

IN THE SECOND CIRCUIT COURT FOR DAVIDSON COUNTY, AT NASHVILLE,TENNESSEE

JESSIE D. MCDONALD, Plaintiff,	)	
vs.	)	No. 90C-1853
YELLOW CAB METRO,INC., Defendant.	)	

ORDER

This cause came on to be heard on the 22nd day of June, 1990, before the Honorable Harry Lester, Judge for the Second Circuit Court for Davidson County, Tennessee, upon Motion for Summary Judgment filed by Defendant, Yellow Cab Metro, Inc., and the Motion for Summary Judgment and Motion to Amend filed by the Plaintiff, Jessie D. McDonald, arguments of Richard E. Norman,Jr., counsel for the Defendant, Yellow Cab Metro,Inc. and the plaintiff, pro se and the pleadings from which the Court is of the opinion and,

THEREFORE, ORDERS THAT:

1. The Motion for Summary Judgment filed by the defendant is hereby granted and this cause be dismissed with costs taxed to the Plaintiff, Jessie D. McDonald.

2. The Motion for Summary Judgment and Motion to Amend filed by the Plaintiff D. McDonald is overruled.

Entered this the 10th. day of July,1990.

HARRY S. LESTER,Judge

IN THE CHANCERY COURT FOR DAVIDSON COUNTY,
AT, NASHVILLE, TENNESSEE,
PART ONE

YELLOW CAB METRO,INC., Plaintiff, vs. JESSIE D. MCDONALD, INDIVIDUALLY, and JESSIE D. McDONALD, d/b/a MCDONALD ENTERPRISES, and YELLOW CAB COMPANY,INC. and YELLOW CAB COMPANY,INC. OF NASHVILLE AND FRANKLIN, Defendants.	No. 87-76-I **Order filed & Entered:** **12/28/87**

FINAL ORDER OF JUDGMENT AND PERMANENT INJUNCTION

This cause came on to be heard before the Honorable Irvin H. Kilcrease,Jr., Chancellor for Part I of the Davidson County Chancery Court on December 17,1987 to determine what relief, if any, should be granted to Plaintiff, Yellow Cab Metro,

Inc. as a result of the special jury verdict after a trial on the merits on December 1st., 1987. After a review of the pleadings, evidence presented, verdict of the jury,and argument of counsel, this Court finds that injunctive relief should lie as a remedy against defendants as follows:

1. Defendants are enjoined jointly and severally from procuring advertising of any nature whatsoever in the Davidson County area;

2. Defendants are enjoined jointly and severally specifically from procuring advertising from South Central Bell of Nashville area under the name Yellow Cab Company,Inc.;

Defendants jointly and severally are enjoined from picking up and dropping off passengers in the Davidson County area under the name Yellow Cab Company,Inc.; and

4. Defendants are enjoined jointly and severally from dispatching vehicles in the Davidson County area under the name Yellow Cab Company,Inc.;

The counterclaim filed by defendants against Yellow Cab Metro,Inc. is dismissed.

Costs in this cause shall be taxed to defendants, McDonald Enterprises, Yellow Cab Company,Inc., and Yellow Cab Company of Nashville and Franklin, Inc. for which judgment shall issue, if necessary.

IRVIN H. KILCREASE,
Chancellor

IN THE CHANCERY COURT FOR DAVIDSON COUNTY,
AT NASHVILLE, TENNESSEE
PART ONE

YELLOW CAB METRO,INC., Plaintiff,	)	
vs.	)	No. 87-76-I
JESSIE D. MCDONALD, Defendant.	)	**Order Filed: March 22, 1988**
		Minute Book 268, Page 26

ORDER

This matter came before this court on the 14th. day of March, 1988 before the Honorable Irving H. Kilcrease,Jr., Chancellor, on Defendant Jessie D. McDonald's motion for leave to appeal in Forma Pauperis and to Stay Enforcement of Judgment. Upon hearing the testimony of Defendant Jessie D. McDonald, and consideration of the entire record in this case, the Court found that the motions were not well taken and made

the following findings with respect to Defendant McDonald's Motion for Leave to proceed in forma pauperis:

1. Defendant McDonald is the owner of McDonald Enterprises.

2. McDonald is self employed as a taxi driver.

3. He is free to work as much as he desires; however, he has chosen to work only a limited amount.

4. McDonald has previously attempted to represent McDonald Enterprises, stating that he did not own it. He subsequently submitted an affidavit stating that the business had been transferred to him.

5. McDonald has previously hired a court reporter in this case.

6. The Court is obliged to consider if McDonald is able to pay court costs.

7. In considering the evidence, including the earlier proceedings in this case, the court finds that the evidence does not preponderate in favor of Defendant McDonald being entitled to proceed in forma pauperis.

8. Defendant McDonald is not unable to bear the costs of appeal, he is unwilling to bear such costs.

The court made these further findings with respect to Defendant McDonald's Motion for Stay of Enforcement.

1. The appropriate criteria for the grant of a stay of enforcement of the order in this case is the same criteria used in considering whether injunctive relief is appropriate, as follows:

(a) Whether the moving party is likely to succeed on the merits;

(b) Whether the moving party will be irreparably harmed if the stay is not granted;

(c) Whether the public interest is served by the grant of the stay.

2. Defendant is not likely to succeed on the merits; the questions at issue have been passed upon by both the jury and the trial court.

3. Defendant McDonald will not suffer irreparable harm if this court does not stay enforcement of the final order in this case. Defendant McDonald is licensed to operate in two counties besides Davidson and can continue to operate in those counties.

Accordingly, it is ORDERED, ADJUDGED and DECREED that Defendant McDonald's Motion for Leave to appeal in forma pauperis is denied. It is further ORDERED that Defendant McDonald shall be required to file a bond for costs of the appeal in the amount of Seven Hundred Fifty Dollars ($750.00).

It is further ORDERED that Defendant McDonald's Motion to Stay Enforcement of the judgment entered by this court is denied.

IRVIN H. KILCREASE,JR.,
Chancellor

IN THE CHANCERY COURT FOR WILLIAMSON COUNTY, AT FRANKLIN , TENNESSEE

JESSIE D. MCDONALD, Individually, Plaintiff, vs. SOUTH CENTRAL BELL TELEPHONE COMPANY, Defendant.	)	No. 19901

ORDER

From a consideration of the entire record herein, the Court is of the opinion that this is not an appropriate case for temporary injunctive relief. Plaintiff's Motion for Temporary Injunction is accordingly hereby overruled.

From the record herein, it does not appear that the defendant has failed to respond to plaintiff's Interrogatories and Request to Inspect and Copy within the time allowed by the Tennessee Rules of Civil Procedure.

Plaintiff's motion for an order to compel discovery is premature and is accordingly hereby overruled.

So Ordered this 3rd., day of July,1990

HENRY DENMARK BELL,
Judge

IN THE THIRD CIRCUIT COURT FOR DAVIDSON COUNTY, AT NASHVILLE, TENNESSEE

JESSIE D. MCDONALD, Plaintiff,	)	
vs.	)	No.90C-2120
STATE OF TENNESSEE, Defendant.	)	

ORDER

This cause came to be heard on July 13, 1990, upon the motion to dismiss filed by the State of Tennessee. Based upon the pleadings filed in this Court and the arguments presented by the plaintiff and counsel for the state, this Court finds that it has no jurisdiction under the plaintiff's original complaint or his amended complaint. A criminal conviction must be attacked through a petition for post conviction relief addressed to the court of conviction. Accordingly, this

action is dismissed for failure to state a cause of action based upon this Court's lack of jurisdiction.

Entered this 24th., day of July,1990

MATTHEW SWEENEY, Judge

IN THE COURT OF CRIMINAL APPEALS, AT NASHVILLE, TENNESSEE

JESSIE D. MCDONALD, Plaintiff in error, vs. STATE OF TENNESSEE, Defendant in error.	Davidson County No. B-317 Below Offense: Obtaining Property by False Pretenses. Reversed and Remanded.

JUDGMENT

Came the Plaintiff in error, Jessie D. McDonald, representing himself, and also came the Attorney General on behalf of the state, and this cause was heard on the transcript of the record from the criminal court of Davidson County; and upon consideration thereof, this Court is of opinion that there is reversible error on the record in that the plaintiff in error was convicted of a crime not charged in the indictment.

It is, therefore, ordered and adjudged by this Court that the judgment of the Court below is reversed, the verdict of the jury set aside, and the cause remanded to the Criminal Court of Davidson County for further proceedings not inconsistent with the Court's opinion, a certified copy of which will accompany the procendo on the remand, and for the collection of the costs of the Court below; for all which, let procedendo issue.

Plaintiff in error is allowed to remain on original bond.

The State of Tennessee will pay the costs of the appeal, which will be certified to the proper officer of the State for payment in the manner provided by law.

The Clerk of this Court will furnish duly certified copies of this judgment to the Sheriff of Davidson County and to the Warden of the State Penitentiary. 5/13/75. (O'Brien, J., Dissenting)

IN THE COURT OF CRIMINAL APPEALS , AT NASHVILLE, TENNESSEE

SEPTEMBER 1974 TERM

JESSIE D. MCDONALD, Plaintiff in Error	No. B-317
v.	Davidson County
STATE OF TENNESSEE Defendant in Error	Allen R. Cornelius, Judge
	Filed: May 13,1975

(Obtaining Property by False Pretenses)

For Plaintiff in Error:	For Defendant:
Jessie D. McDonald,Pro se Nashville, Tennessee	Milton P. Rice Attorney General of Tennessee; William C. Koch, Jr., Assistant Attorney General Nashville,Tenn.; Robert H.Schwartz, Assistant District Attorney General Nashville, Tenn.

OPINION FILED: May 13,1975

REVERSED AND REMANDED

W. Wayne Oliver
Judge

OPINION

The defendant was tried and convicted under the third count of the indictment. In essence that count charges that, with the intent to defraud a named credit union (from whom he borrowed money to buy a car), he ontained from the county court clerk a clear and unencumbered title to a $3,150 Ford LTD automobile upon which the credit union had a lien,by falsely and fraudulently representing to the county court clerk that the credit union had released its lien and the car was unencumbered "with the fraudulent and felonious intent to deprive (the credit union) of its personal property and thereby caused (the county court clerk) to rely on said false and fraudulent representation and to deliver said unincumbered title to said automobile to the defendant,. . ." (Emphasis supplied).

Thus, that count of the indictment does not charge that the defendant made any false representation to the credit union which owned the lien and was the victim, nor does it charge that the credit union relied upon any representation by the defendant. Instead, the indictment charges that the false and fraudulent representation was made to the county court clerk and that he relied on it and issued to the defendant an unencumbered title to the automobile. So, the question immediately arises whether the third count of the indictment charges a violation of TCA §39-1901, upon which this prosecution is based.

The trial judge read that statute to the jury, and stated the elements essential to constitute a violation of it exactly as they are set forth in **Beck** v. **State**, 203 Tenn. 671,675, 315 S.W. 2d

254, wherein the Court said: "These elements are (1) the pretense, (2) the falsity of same, (3) the felonious and fraudulent intent, (4) the description of the property,and (5) the reliance of the victim upon the perpesentationa." (Emphasis supplied). In **Beck**, the prosecutor was bilked of $7,000.00 in money which he turned over to the defendants upon their false and fraudulent representation that they would arrange for him to purchase a large quantity of whiskey which the sheriff had confiscated and which the court had ordered sold. Thus, the fraudulent representation was made directly and personally to the owner of the money, he was the victim and turned his money over to them in reliance upon what they said.

In **Mullican** v. **State**, 210 Tenn. 505, 360 S.W. 2d 35, it is emphasized that the person claiming to have been injured by

the defendant's false and fraudulent representations must have parted with his property in reliance thereon, that by his false and fraudulent pretenses the defendant induced the party sought to be wronged to part with his property; and that the statute is not violated if the person claiming to have been defrauded parts with his property in reliance on the advuce of others and not the defendant's representation.

After stating the essential ingredients necessary to constitute a violation of TCA §39-1901, as above noted, the trial court went on to say to the jury:

> "...and the obtaining of the goods or money by false pretense and with intent to defraud; and if the false pretense created the credit, it is within the statute.
>
> "You will note from the reading of Section 39-1901 of the Code above mentioned, that the law prohibits the obtaining of possession, intending at the time of receiving the property

to feloniously steal the same. It is the State's theory that the defendant had this intention at a subsequent date by obtaining a clear and uncumbered title to a 1972 Ford LTD automobile. Of Course, it is for you, the jury, to determine what the intention of the defendant was at the time of obtaining possession of the title to a 1972 Ford LTD automobile, and it is for you to determine, if in fact, the State has proved that this defendant did in fact, obtain the title to a 1972 Ford LTD automobile, and if this fact sheds any light upon your determination of the issue of guilt in the initial obtaining possession of said property." (Emphasis supplied).

Upon this record there can be no doubt that the trial court was confused as to whether the defendant was charged with obtaining credit by false pretenses and as to whether the credit union's "property" mentioned in the indictment referred to the automobile. It is likewise clear that the jury also considered that the "property" involved was the automobile, for when they reported to the court after deliberation that they found the defendant

guilty of receiving property by means of false pretenses and that they found the value of the property to be more than $100, there was a colloquy between the trial judge and the jury foreman in which the latter inquired if the jury had authority to fix the sentence at less than three years. The court replied that they could not do so if they found the value of the property over $100, and the foreman replied, "A'72 LTD is valued over a hundred dollars."

At any rate, it is unquestionable that the third count of the indictment upon which the defendant was convicted does not charge a violation of TCA §39-1901. He did not obtain the automobile from the credit union, and there is no charge of proof that he felonously and fraudulent made any false pretenses or representation to the credit union in obtaining the

loan. Upon the face of the indictment and upon the record, his only false and fraudulent representation was made to the county court clerk, and that official believed and relied upon his false statement that the credit union had released its lien on the car and issued to him a clear title to it.

Whatever crime the defendant committed, it was not obtaining property by false pretenses in violation of that statute. He was, therefore, convicted of a crime not charged in the indictment. Such a conviction cannot stand. Criminal prosecutions cannot be sustained by intendment, but everything necessary to constitute the offense must be charged. **Church** v. **State**, 206 Tenn. 336, 333 S.W. 2d 799; **Huffman** v. **State**, 200 Tenn. 487, 495, 292 S.W. 2d 738; **Clark** v. **State**, 197 Tenn. 67, 270 S.W. 2d 361. See also: **21 Am.Jur.2d., Criminal Law**

§226, p. 265. Conviction upon a charge not made or without evidence of guilt is a denial of due process of law. **Thompson v. City of Louisville**, 362 U.S. 199, 80 S.Ct. 624, 4 L.Ed. 2d 654.

Accordingly, the judgment of the trial court is reversed and this case is remanded thereto for further proceedings not inconsistent with this opinion.

W. WAYNE OLIVER,
Judge

Concur:

MARK A. WALKER,
Presiding Judge

(SEE DISSENTING OPINION)

CHARLES H. O'BRIEN,
Judge

IN THE COURT OF CRIMINAL APPEALS, AT NASHVILLE , TENNESSEE
SEPTEMBER SESSION,1974

JESSIE D. MCDONALD, Plaintiff In Error	)	No. B-317
v.	)	Davidson
STATE OF TENNESSEE, Defendant In Error	)	Criminal

(OBTAINING PROPERTY BY FALSE PRETENSE)

DISSENTING OPINION

A jury verdict was returned in the Davidson County Criminal Court finding defendant guilty of obtaining property valued over one hundred dollars under false pretenses. The judgement of the trial court fixed punishment at three years in the State Penitentiary. On this appeal the majority have reversed the trial court judgment. I am not in accord with the views expressed in the majority opinion.

The indictment against defendant was returned at the January,1973 Term of court. The conclusion of the matter has been considerably delayed because of defendant's refusal to accept the services of trained and competent counsel. He declined appointment of an attorney in the trial court and acted as his own counsel. At the May, 1974, Term of this court at Nashville defendant was endeavoring to proceed by petition for certiorari to the trial court to dismiss the indictment and judgment against him. He appeared on his own behalf. The panel considering the matter enjoined him to procure counsel. He stated his understanding in open court that counsel would be provided for him upon proof of indigency, but refused the services of appointed counsel because he preferred to represent himself. It appears defendant has filed five or six proceedings in U.S. District

Court; has appealed to the Sixth Circuit Court of Appeals and the U.S. Supreme Court at least once; has been twice before this court, and has filed at least one proceeding in the State Supreme Court, all involved with these charges.

Defendant has made numerous assignments of error on this appeal by the first of which he charges the trial court erred in bringing him to trial on the 17th.,of January, 1974, before the case was remanded back to the state court from the federal courts.

Preliminary to trial defendant brought to the attention of the trial judge that he had filed proceedings to remove the action to district court, and suggested any action the state court might take would be void. The trial judge proceeded with the trial, stating that the district

court as well as the Sixth Circuit Court of Appeals had dismissed defendant's actions in those courts.

There is nothing else in this record, of which we may take cognizance, indicating removal of these proceedings to the United States District Court. While the motions and the pleadings of various sorts which have been filed by the defendant are multifarious, the law is clear that in order to make extraneous matters a part of the record, they must be examined by the trial judge and authenticated by his signature in such a manner as to make their identity certain. Parts of a Bill of Exceptions may be in the form of exhibits to be inserted in their proper place, according to the directions given therein; but all of the Bill of Exceptions whether one or more documents, must be present and examined when it is signed

by the judge, and several papers to be copied must be so marked as exhibits that no mistake in their idenity can be made. If any extrinsic matters, which can only be made part of the record by Bill of Exceptions, appear in the transcript without proper authentication they cannot be considered by this court. **Chico** v. **State**, 217 Tenn. 19, 394 S.W. 2d 648, and cited cases.

Defendant says he was brought to trial without any authority of law. This assignment as well as the third, to the effect that there was no evidence presented to the court to sustain the conviction of a charge of obtaining property under false pretenses, seems to be an attack on the weight and legal sufficiency of the evidence.

In this case the State's evidence, supported by appropriate exhibits, was

that on October 2nd., 1972, defendant made a loan from the Purity Daires Employees Federal Credit Union in the amount of three thousand one hundred fifty dollars ($3,150.00) to purchase an automobile. He volunteered to record the appropriate papers. On October 3rd.,1972, he made application for title to the automobile. In doing so he made oath to the application in which he allowed the address of the credit union to appear on the application as the same as his own residence. He took title in the name of Jessie D. McDonald II. On December 9th., Jessie D. McDonald,II assigned title to the automobile to Jessie D. McDonald,Sr., whose address, according to the instrument was the same as his own. The notary who took his acknowledgement was personally acquainted with him, and recalled the occurance. The same instrument including a discharge

of lien which had been the legend,"Purity Daires Empl. Fed. Cred. Union, "stamped at the place on the instrument where the lienor's signature should have been. On December 11th.,1972, Jessie D. McDonald Sr. made application for title to the automobile and made oath that the vehicle was free from any encumberances. In the process of this registration he made two additional affidavits, one, to the effect that the automobile was a gift from his son, and the other, for the purpose of transferring license plates, that Jessie D. McDonald and Jessie D. McDonald Sr. were one and the same person. On January 6th.,1973, in response to a notice from the credit union that his payments were in arrears, defendant advised the credit union representative by letter that his loan had been paid in full, and there was no lien on the automobile in question,

and that he was no longer in possession of the automobile, nor the owner of it. The proof clearly shows Jessie McDonald, Jessie D. McDonald,II and Jessie McDonald Sr. to be one and the same person in these transactions.

There is no doubt that this evidence fully warranted the verdict of the jury, and clearly preponderated in favor of the correctness of the verdict and against the innocence of the defendant.

By his fourth assignment, defendant charges error to trial court in refusing to quash, or dismiss the indictment against him.

The indictment contains three counts. On Order of the trial court the State elected to go to trial on the 3rd count which charged:

> "Jessie D. McDonald, heretofore, to wit, on the ___of December,1972,with force and arms, in the County afore-

said, unlawfully, feloniously and with felonious intent to defraud one Purity Dairies Employees Federal Credit Union, a federally chartered credit union did obtain from Robert E. Worrall, County Court Clerk or his agent or deputy, clear and unincumbered title to a 1972 Ford LTD automobile of the value of three thousand on hundred fifty ($3,150.00) Dollars , said automobile being at the time incumbered by a lien in favor of Purity Dairies Employees Federal Credit Union, a federally chartered credit union by means of a certain false pretense then and there made by said Jessie D. McDonald, to said Robert E. Worrall, County Court Clerk or his agent or deputy, whereby said Jessie D. McDonald falsely and fraudulently represented as follows: that lien in favor of said credit union on said automobile had been released by said credit union and that there were no incumberances on said automobile which representation was false and untrue and was made by said defendant with the fraudulent and felonious intent to deprive said Purity Dairies Employees Federal Credit Union, a federally chartered credit union of its personal property and thereby cause the said Robert E. Worrall to rely on such false and fraudulent representation and to deliver said unincumbered title to said automobile to the said defendant, contrary to the form of the statutes in such cases made and provided,and against the peace and dignity of the State of Tennessee."

The indictment clearly made out an offense under the statute, (T.C.A. Section 39-1901), and sufficiently apprised defendant of the charges made against him in order that he could prepare his defense and be secure against the initiation of further proceedings against him for the same offense. The false pretense began when defendant offered to record the security agreement and allied papers involved in securing the loan which set out that he granted to the Purity Dairies Employees Federal Credit Union a security interest in one 1972 Ford LTD, 2 door hardtop, serial number 2U68S127257 to secure the payment of a note in the sum of $3,150.00. His felonious and fraudulent intent became manifest upon making application for title to the automobile in which he made oath that his address and that of the credit union were one and

the same. He carried out the intent by transferring title to the automobile to himself, while in the process releasing the lien securing the victim, Purity Dairies Employees Federal Credit Union in the amount of $3,150.00, under their security agreement. The representative of the credit union relied upon the representations of defendant that he would properly record the instruments protecting their interest. As stated in the majority opinion, fraudulent representation was made directly and personally to the representative of the credit union, who was the owner of the money, and who turned over the money to him in reliance upon what he said.

There are other assignments in one of which defendant complained the trial court refused to dispose of an amendment to his

motion for new trial. The amendment was filed in erroneous reliance on the rules of civil procedure. The motion came after the trial court had lost jurisdiction of the case by virture of defendant's appeal. Defendant says it was error to allow the guilty verdict to stand after doubt existed in the jury's verdict. At the trial the jury returned a verdict of guilty and then expressed some reluctance to assess a penalty of three years for the offense. After proper instructions from the trial judge they returned to their deliberations and subsequently fixed the penalty at no more than three years in the penitentiary. The verdict of the jury was properly returned. Whether or not to direct a verdict addressed itself to the sound discretion of the trial court. **Carmon v. State**, _____ Tenn. Cr. App. _____, 512 S.W. 2d 595.

A thorough review of this record and the evidence introduced at trial makes it clear that the judgment of the trial court should properly have been affirmed.

CHARLES H. O'BRIEN, Judge

IN THE SUPREME COURT OF TENNESSEE, AT NASHVILLE

STATE OF TENNESSEE,	)	
Petitioner,	)	FOR PUBLICATION
v.	)	January 19,1976
JESSIE D. MCDONALD,	)	DAVIDSON CRIMINAL
Respondent.	)	A. Cornelius, J.

FOR PETITIONER:

Milton P. Rice
Attorney General
Nashville, Tenn.

William C. Koch,Jr.
Assistant Attorney General
Nashville, Tennessee

FOR RESPONDENT:

Jessie D. McDonald,
Pro se
Nashville, Tenn.

OPINION

REVERSED **HENRY,J.**

We granted certiorari in this case to consider the single question of whether the reliance of the victim upon the false representation or pretense is necessary to sustain a conviction under Section 39-1901, T.C.A.[1]

We respond in the negative.

I.

Respondent was convicted upon an indictment which charged that he obtained from the county court clerk of Davidson County a clear and unencumbered title to a 1972 Ford LTD automobile which was encumbered by a lien in favor of Purity Dairies Employees Federal Credit Union, by falsely and fraudulently representing that a lien in favor of the credit union upon the automobile had been released and that it was free of encumberances.

Respondent's approach was incredibly ingenious and remarkably bold.

Under the name of Jessie D. McDonald, he applied for and recieved a loan from the credit union to finance the purchase

---

[1] Section 39-1901, T.C.A. reads as follows:

39-1901. False Pretense.--Anu person, who, by any false pretense, or by any false token or counterfeit letter, with intent to defraud another, obtains from any person any personal property or signature of any person to any written instrument, the false making of which is forgery, shall, on conviction, be punished as in case of larceny.

The words "false pretense" include all cases of pretended buying, borrowing, or hiring, bailment or deposit, and all cases of pretended ownership, where the person obtaining possession intended, at the time he received the property, feloniously to steal the same.

of a new automobile. Upon closing he executed a note and security agreement.He then volunteered to take the documents downtown and apply for a certificate of title. This was the triggering false representation, and the credit union with astonishing credulity and naivete relied upon him.

The next day he presented himself at the County Court Clerk's Office, using the name of Jessie McDonald,II, and applied for a title certificate. In so doing he falsely and fraudulently gave his own address as the address of the credit union, with the result that the title was issued and mailed to the lien holder at respondent's address.

Subsequently, using the name of Jessie D. McDonald,II, he assigned the title to his father, Jessie D. McDonald, Sr. he presented himself at the County Court

Clerk's Office and applied for a certificate of title. The certificate tendered to the clerk indicated that the vehicle had been sold to McDonald,Sr. and contained a notarized release of the lien, with the credit union's name stamped thereon. He made affidavit that the vehicle was free of encumberances.

In order to avoid the sales tax, he executed an affidavit that the automobile was a gift from his son. In connection with the transfer of the license plates, he swore that Jessie D. McDonald and Jessie D. McDonald,Sr., were one and the same. This was true; all McDonalds were one and the same.

Subsequent to this he receiced a notice that payment was due and he wrote the credit union advising them that his loan had been paid in full; that there was no lien on the automobile, and that

he was no longer the owner.

This prosecution ensued.

II.

Our view has been limited to the narrow issue of whether the victim must rely upon the false representation to support a conviction under the statute.

Section 39-1901,T.C.A. originated in Chapter 23 of the Public Acts of 1829 and Chapter 48 of the Public Acts of 1841-1842.

To our knowledge the first case construing these enactments is **McCorkle** v. **State**, 41 Tenn. 333 (1860). The Court declared the ingredients of the offense to be "obtaining the goods by false pretenses and with an intent to defraud." The Court made this significant comment:

> " As was said by Lord Kenyon (3 Term Rep. 103), the statute creating this offense describes it in terms extremely general. It seems difficult to draw the line, and to say to what cases it shall extend; and therefore

We must see whether each particular case,as it arises, comes within it."

41 Tenn. at 336, 337.

This conclusion reached more than a century ago continues to be valid. Not even a statute creating a criminal offense can spell out the specifics with mathematical certainty and, indeed,absolute precision is not required. Both common law concept and constitutional due process are satisfied when the statute informs all citizens as to what the state commands or forbids, and outlines the proscribed conduct with reasonable certainty. Its terminology must give fair warning, **Raley** v. **Ohio**, 360 U.S. 423, 3 L.Ed. 2d 1344, 79 S.Ct. 1257 (1959), and must not be a trap for the innocent. **United States** v. **Cardiff**, 344 U.S. 174, 97 L.Ed. 200, 73 S.Ct. 189 (1952). Section 39-1901 meets these standards.

A significant recent case **Beck** v. **State**, 203 Tenn. 671, 315 S.W. 2d 254 (1958). There, the Court adopted the holding of **State** v. **Morgan**, 109 Tenn. 157, 69 S.W. 970 (1902) and reinterated that the elements of the offense of violating the statute on false pretenses are:"(1) the pretense, (2) the falsity of the same, (3) the felonious and fraudulent intent, (4) the description of the property, and (5) the reliance of the victim upon the representations." (Emphasis supplied). The state in brief correctly characterized the fifth element (reliance) as dictum in view of the fact that the false representation was made by **Beck** directly to the victim, hence the Court was under no necessity to address this requirement. In **Morgan**, the Court, in passing upon the validity of the indictment, merely analyzed it under five headings, one of them

being "reliance" of the victim. Again the Court did not directly address the necessity for reliance.

The latest pertinent pronouncement of this Court was in **Mullican v. State**, 210 Tenn. 505, 360 S.W. 2d 35 (1962) wherein the Court enumerated the elements of the offense thusly:

> "[T]he false representation made must be representation of a past or existing fact, whether it be by oral or written words or conduct,which is calculated to deceive, or intended to deceive, and does as a matter of fact deceive; and by means of which, by doing these things, the person who does it,obtains something of value from the person injured without proper compensation. (citations omitted).

. . . under this statute the intent to defraud is the gravamen or an essential element in the crime. **210 Tenn. at 511**, 360 S.W. 2d at 38.

Dicta aside, the courts of this state have never held that the reliance of the

victim is an element of the offense proscribed in Section 39-1901. Indeed, there is an analogous line of cases to the contrary. As a matter of fact, **Beck**, supra, correctly treats as settled law that it is not necessary that the representation must be calculated to deceive a man of ordinary prudence and caution. As pointed out in 12 Vanderbilt L.Rev., pages 1134,1135 in commenting on this phase of **Beck**,"Regardless of its merits or demerits in tort law, it would seem strange indeed to let the necessity of such reliance remain in the law of crimes to work a kind of estoppel against victims of false pretenses who may be deficient in astuteness and vigilance in favor of the perpetrators thereof. . ." Would it not be equally strange to establish as a part of our law that the reliance of the victim is an essential element of the offense of

the offense of obtaining money or property under false pretenses ?

It is obvious that there must be reliance by someone, but in this modern day and age when fraud and deceit are practiced with sophistication and ingenuity a narrow construction such as this would be tantamount to a judicial conference of theproverbial "locense to steal".

We hold that the reliance of the victim is not an essential element of the offense "false pretense" as defined in Section 39-1901 T.C.A. We hold that our statute is satisfied, in this respect, when the person to whom the false representation is made or the false token or counterfeit letter is offered, relies upon the same to the ultimate detriment of the victim.

An excellent line of reasoning is contained in **Commonwealth** v. **Johnson**, 167 Ky. 727, 181 S.W. 368(1916)[According

to our own case of **State** v. **Higgins**, 148 Tenn. 609, 256 S.W. 875 (1923) the Kentucky statute is markedly similiar to ours]. The Court said:

> " The statute does not require that the false statement should be made to any particular person, or that it should be with the intention of committinf a fraud upon the person to whom the false statement was made. The offense is committed when the false statement is made, with the intention to committ a fraud, and money or property is thereby obtained.
>
> * * * * * * *
>
> The purpose of the statute is to punish the perpetrators of fraud committed through any false pretense. The gist of the offense is the successful misrepresentation, regardless of the person to to whom it was made. (Emphasis supplied)

181 S.W. at 370.

The judgment of the trial court is reinstated; that of the Court of Criminal Appeals is

Reversed.

HENRY, J.

CONCURRING:
FONES, C.J.
COOPER, J.
BROCK, J.
HARBISON, J.

IN THE SUPREME COURT OF TENNESSEE

AT NASHVILLE

JESSIE D. MCDONALD, Petitioner,	)	For Publication
	)	March 15,1976
vs.	)	DAVIDSON CRIMINAL
	)	No. B-317
STATE OF TENNESSEE, Respondent.	)	

OPINION ON MOTION TO REHEAR AND MOTIONS

The petition to rehear is respectfully overruled.

The motion to set aside the conviction is respectfully denied.

The motion for a stay pending application to the Supreme Court of the United States for certiorari is granted, providing the petition is timely filed. Pending the filing and disposition of said petition, the judgment of this court will be stayed and defendant may remain upon his present bond.

HENRY, J.

SUPREME COURT OF THE UNITED STATES

IN RE JESSIE McDONALD, PETITIONER

ON MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

No. 88–5890. Decided February 21, 1989

PER CURIAM.

Pro se petitioner Jessie McDonald requests that this Court issue a writ of habeas corpus pursuant to 28 U. S. C. § 2241(a). He also requests that he be permitted to proceed *in forma pauperis* under this Court's Rule 46. We deny petitioner leave to proceed *in forma pauperis*. He is allowed until March 14, 1989, within which to pay the docketing fee required by Rule 45(a) and to submit a petition in compliance with Rule 33 of the Rules of this Court. We also direct the Clerk not to accept any further petitions from petitioner for extraordinary writs pursuant to 28 U. S. C. §§ 1651(a), 2241 and 2254(a), unless he pays the docketing fee required by Rule 45(a), and submits his petition in compliance with Rule 33. We explain below our reasons for taking this step.

Petitioner is no stranger to us. Since 1971, he has made 73 separate filings with the Court, not including this petition, which is his eighth so far this Term. These include four appeals,[1] 32 petitions for certiorari,[2] 22 petitions for extra-

[1] See *McDonald* v. *Alabama*, 479 U. S. 1061 (1987); *In re McDonald*, 466 U. S. 957 (1984); *McDonald* v. *Tennessee*, 432 U. S. 901 (1977); *McDonald* v. *Purity Dairies Employees Federal Credit Union*, 431 U. S. 961 (1977).

[2] See *McDonald* v. *Tobey*, 488 U. S. —— (1988) (No. 88–5619); *McDonald* v. *Metropolitan Government of Nashville and Davidson County*, 481 U. S. 1053 (1987); *McDonald* v. *Tennessee*, 475 U. S. 1088 (1986); *McDonald* v. *Tennessee*, 474 U. S. 951 (1985); *McDonald* v. *Leech*, 467 U. S. 1208 (1984); *McDonald* v. *Humphries*, 461 U. S. 946 (1983); *McDonald* v. *Metropolitan Government of Nashville and Davidson County*, 461 U. S. 934 (1983); *McDonald* v. *Draper*, 459 U. S. 1112 (1983); *McDonald* v. *Thompson*, 456 U. S. 981 (1982); *McDonald* v. *Metropolitan Government of Nash-*

ordinary writs,[3] five applications for stays and other injunctive relief,[4] and 10 petitions for rehearing.[5] Without recorded dissent, the Court has denied all of his appeals and

---

ville & Davidson County, 455 U. S. 957 (1982); *McDonald* v. *Tennessee*, 454 U. S. 1088 (1981); *McDonald* v. *Draper*, 452 U. S. 965 (1981); *McDonald* v. *Tennessee*, 450 U. S. 983 (1981); *McDonald* v. *Draper*, 450 U. S. 983 (1981); *McDonald* v. *Metropolitan Airport Authority*, 450 U. S. 1002 (1981); *McDonald* v. *Metropolitan Government of Nashville and Davidson County*, 450 U. S. 933 (1981); *McDonald* v. *United States District Court*, 444 U. S. 900 (1979); *McDonald* v. *Birch*, 444 U. S. 875 (1979); *McDonald* v. *United States District Court*; and *McDonald* v. *Yellow Freight Systems, Inc.*, 444 U. S. 875 (1979); *McDonald* v. *Thompson*, 436 U. S. 911 (1978); *McDonald* v. *Tennessee*, 434 U. S. 866 (1977); *McDonald* v. *Davidson County Election Commission*, 431 U. S. 958 (1977); *McDonald* v. *Tennessee*, 431 U. S. 983 (1977); *McDonald* v. *Tennessee*, 429 U. S. 1064 (1977); *McDonald* v. *Tennessee*, 425 U. S. 955 (1976); *McDonald* v. *Tennessee*, 423 U. S. 991 (1975); *McDonald* v. *Tennessee*, 416 U. S. 975 (1974); *McDonald* v. *Tennessee*, 415 U. S. 961 (1974); *McDonald* v. *Wellons*, 414 U. S. 1074 (1973); *McDonald* v. *Metro Traffic and Parking Comm'n*, 409 U. S. 1117 (1973); *McDonald* v. *Wellons*, 405 U. S. 928 (1972); *McDonald* v. *Metropolitan Traffic and Parking Comm'n*, 404 U. S. 843 (1971).

[3] *In re McDonald*, 488 U. S. —— (1988) (No. 88–5429, mandamus and/or prohibition); *In re McDonald*, 488 U. S. —— (1988) (No. 88–5428, mandamus and/or prohibition); *In re McDonald*, 488 U. S. —— (1988) (No. 88–5397, mandamus and/or prohibition); *In re McDonald*, 488 U. S. —— (1988) (No. 88–5006, common law certiorari); *In re McDonald*, 488 U. S. —— (1988) (No. 87–7220, common law certiorari); *In re McDonald*, 488 U. S. —— (1988) (No. 87–7183, common law certiorari); *In re McDonald*, 485 U. S. —— (No. 87–6420, mandamus); *In re McDonald*, 484 U. S. —— (1987) (No. 87–5008, common law certiorari); *In re McDonald*, 484 U. S. —— (1987) (No. 86–7086, habeas corpus); *In re McDonald*, 484 U. S. —— (1987) (No. 86–7052, common law certiorari and habeas corpus); *In re McDonald*, 484 U. S. —— (1987) (No. 86–7086) (habeas corpus); *In re McDonald*, 479 U. S. 809 (1986) (habeas corpus); *In re McDonald*, 470 U. S. 1062 (1985) (habeas corpus); *In re McDonald*, 464 U. S. 811 (1983) (mandamus and/or prohibition); *McDonald* v. *Draper*, 451 U. S. 978 (1981); *McDonald* v. *Leathers*, 439 U. S. 815 (1978) (leave to file petition for writ of mandamus); *McDonald* v. *Thompson*, 434 U. S. 812 (1977) (leave to file petition for writ of habeas corpus); *McDonald* v. *Tennessee*, 430 U. S. 963 (1977) (motion to consolidate No. 76–6507 and for leave to file petition for

[Footnotes 4 and 5 are on page 3]

denied all of his various petitions and motions. We have never previously denied him leave to proceed *in forma pauperis*.[4]

The instant petition for a writ of habeas corpus arises from petitioner's 1974 state conviction for obtaining title to a 1972 Ford LTD automobile under false pretenses, for which he was sentenced to three years' imprisonment. Petitioner appealed to the Tennessee Court of Criminal Appeals, which reversed his conviction on the ground that there was no evidence that the alleged victim relied on petitioner's false statements. In January 1976, the Supreme Court of Tennessee reinstated his conviction. *State* v. *McDonald*, 534 S. W. 2d 650. We denied certiorari, 425 U. S. 955 (1976), rehearing denied, 425 U. S. 1000 (1976).

In the 13 years since his conviction became final, petitioner has filed numerous petitions and motions for relief in this

---

writ of habeas corpus); *McDonald* v. *Thompson*, 429 U. S. 1088 (1977) (leave to file petition for writ of habeas corpus and other relief); *McDonald* v. *Tennessee*, 429 U. S. 1012 (1976) (stay and other relief); *McDonald* v. *United States Court of Appeals*, 420 U. S. 922 (1975) (leave to file petition for writ of mandamus); *McDonald* v. *Mott*, 410 U. S. 907 (1973) (leave to file petition for writ of mandamus and other relief).

[2]See *McDonald* v. *Metropolitan Government*, 487 U. S. —— (1988) (A-930, stay); *McDonald* v. *Metropolitan Government of Nashville and Davidson County*, 481 U. S. 1010 (1987) (stay); *McDonald* v. *Alexander*, 458 U. S. 1124 (1982) (injunction); *McDonald* v. *Thompson*, 432 U. S. 903 (1977) (application for supersedeas bond); *McDonald* v. *Tennessee*, 415 U. S. 971 (1974) (stay).

[3]See *McDonald* v. *Alabama*, 480 U. S. 912 (1987); *In re McDonald*, 479 U. S. 966 (1986); *McDonald* v. *Tennessee*, 475 U. S. 1151 (1986); *In re McDonald*, 471 U. S. 1062 (1985); *McDonald* v. *Leech*, 467 U. S. 1257 (1984); *McDonald* v. *Draper*, 459 U. S. 1229 (1983); *McDonald* v. *Thompson*, 457 U. S. 1126 (1982); *McDonald* v. *Draper*, 451 U. S. 933 (1981); *McDonald* v. *Tennessee*, 425 U. S. 1000 (1976); *McDonald* v. *Tennessee*, 417 U. S. 927 (1974).

[4]In the affidavit in support of his present motion to proceed *in forma pauperis*, petitioner states that he earns approximately $300 per month, is self-employed, and has less than $25 in his checking or savings account. He states that he has no dependents.

Court and in the Tennessee courts, all of which have been rejected. In the instant petition, for example, he requests that the Court "set aside" his conviction and direct the State to "expunge" the conviction "from all public records." He is not presently incarcerated. He contends that his constitutional rights were violated by the State's failure to prove that the property to which he obtained title under false pretenses was valued at over $100, as required by the statute under which he was convicted. Petitioner has put forward this same argument—unsuccessfully—in at least four prior filings with the Court, including a petition for mandamus, which was filed 13 days before the instant petition and was not disposed of by the Court until more than a month after this petition was filed.[1]

Title 28 U. S. C. § 1915 provides that "[a]ny court of the United States *may* authorize the commencement, prosecution or defense of any suit, action or proceeding, civil or criminal, or appeal therein, without prepayment of fees and costs or security therefor" (emphasis added). As permitted under this statute, we have adopted Rule 46.1, which provides that "[a] party desiring to proceed in this Court *in forma pauperis* shall file a motion for leave to so proceed, together with his affidavit in the form prescribed in Fed. Rules App. Proc., Form 4 . . . setting forth with particularity facts showing that he comes within the statutory requirements." Each year, we permit the vast majority of persons who wish to proceed *in forma pauperis* to do so; last Term, we afforded the privilege of proceeding *in forma pauperis* to about 2,300 persons. Paupers have been an important—and valued—

[1] See *In re McDonald*, 488 U. S. —— (1988) (No. 88–5428, petition for mandamus and/or prohibition); *In re McDonald*, 484 U. S. —— (1987) (No. 86–7052, petition for common law certiorari or habeas corpus); *McDonald* v. *Tennessee*, 475 U. S. 1088, rehearing denied, 475 U. S. 1151 (1986) (petition for certiorari); *In re McDonald*, 479 U. S. 809 (1986) (petition for habeas corpus).

part of the Court's docket, see, *e. g.*, *Gideon* v. *Wainwright*, 372 U. S. 335 (1963), and remain so.

But paupers filing *pro se* petitions are not subject to the financial considerations—filing fees and attorneys fees—that deter other litigants from filing frivolous petitions. Every paper filed with the Clerk of this Court, no matter how repetitious or frivolous, requires some portion of the institution's limited resources. A part of the Court's responsibility is to see that these resources are allocated in a way that promotes the interests of justice. The continual processing of petitioner's frivolous requests for extraordinary writs does not promote that end. Although we have not done so previously, lower courts have issued orders intended to curb serious abuses by persons proceeding *in forma pauperis*.[4] Our order here prevents petitioner from proceeding *in forma pauperis* when seeking extraordinary writs from the Court.[5] It is perhaps worth noting that we have not granted the sort of extraordinary writ relentlessly sought by petitioner to any litigant—paid or *in forma pauperis*—for at least a decade. We have emphasized that extraordinary writs are, not surprisingly, "drastic and extraordinary remedies," to be "reserved for really extraordinary causes," in which "appeal is clearly an inadequate remedy." *Ex parte Fahey*, 332 U. S. 258, 259, 260 (1947).

---

[4] See, *e. g.*, *Procup* v. *Strickland*, 792 F. 2d 1069 (CA11 1986); *Peck* v. *Hoff*, 660 F. 2d 371 (CA8 1981); *Green* v. *Carlson*, 649 F. 2d 285 (CA5 1981); cf. *In re Martin-Trigona*, 737 F. 2d 1254, 1261 (CA2 1984) ("Federal courts have both the inherent power and constitutional obligation to protect their jurisdiction from conduct which impairs their ability to carry out Article III functions").

[5] Petitioner has repeatedly ignored the letter and spirit of this Court's Rule 26, which provides in part that, "[t]o justify the granting of [an extraordinary writ], it must be shown that the writ will be in aid of the Court's appellate jurisdiction, that there are present exceptional circumstances warranting the exercise of the Court's discretionary powers, and that adequate relief cannot be had in any other form or from any other court."

Petitioner remains free under the present order to file *in forma pauperis* requests for relief other than an extraordinary writ, if he qualifies under this Court's Rule 46 and does not similarly abuse that privilege.

It is so ordered.

SUPREME COURT OF THE UNITED STATES

IN RE JESSIE McDONALD, PETITIONER

ON MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

No. 88-5890. Decided February 21, 1989

JUSTICE BRENNAN, with whom JUSTICE MARSHALL, JUSTICE BLACKMUN, and JUSTICE STEVENS join, dissenting.

In the first such act in its almost 200-year history, the Court today bars its door to a litigant prospectively. Jessie McDonald may well have abused his right to file petitions in this Court without payment of the docketing fee; the Court's order documents that fact. I do not agree, however, that he poses such a threat to the orderly administration of justice that we should embark on the unprecedented and dangerous course the Court charts today.

The Court's denial not just of McDonald's present petition but also of his right to file for extraordinary writs *in forma pauperis* in the future is, first of all, of questionable legality. The federal courts are authorized by 28 U. S. C. § 1915 to permit filings *in forma pauperis*. The statute is written permissively, but it establishes a comprehensive scheme for the administration of *in forma pauperis* filings. Nothing in it suggests we have any authority to accept *in forma pauperis* pleadings from some litigants but not from others on the basis of how many times they have previously sought our review. Indeed, if anything, the statutory language forecloses the action the Court takes today. Section 1915(d) explains the circumstances in which an *in forma pauperis* pleading may be dismissed as follows: a court "may dismiss *the case* if the allegation of poverty is untrue, or if satisfied that the action is frivolous or malicious" (emphasis added). This language suggests an individualized assessment of frivolousness or maliciousness that the Court's prospective order precludes. As one lower court has put it, a court's discretion to dismiss *in forma pauperis* cases summarily "is limited . . . in

every case by the language of the statute itself which restricts its application to complaints *found to be* frivolous or malicious." *Sills* v. *Bureau of Prisons*, 245 U. S. App. D. C. 389, 391, 761 F. 2d 792, 794 (1985) (emphasis added). Needless to say, the future petitions McDonald is barred from filing have not been "found to be" frivolous. Even a very strong and well-founded belief that McDonald's future filings will be frivolous cannot render a before-the-fact disposition compatible with the individualized determination § 1915 contemplates.

This Court's Rule 46 governs our practice in cases filed *in forma pauperis*. No more than § 1915 does it grant us authority to disqualify a litigant from future use of *in forma pauperis* status. Indeed, Rule 46.4 would seem to forbid such a practice, for it specifies that when the filing requirements described by Rule 46 are complied with, the Clerk "will file" the litigant's papers "and place the case on the docket." Today we order the Clerk to refuse to do just that. Of course we are free to amend our own rules should we see the need to do so, but until we do we are bound by them.

Even if the legality of our action in ordering the Clerk to refuse future petitions for extraordinary writs *in forma pauperis* from this litigant were beyond doubt, I would still oppose it as unwise, potentially dangerous, and a departure from the traditional principle that the door to this courthouse is open to all.

The Court's order purports to be motivated by this litigant's disproportionate consumption of the Court's time and resources. Yet if his filings are truly as repetitious as it appears, it hardly takes much time to identify them as such. I find it difficult to see how the amount of time and resources required to deal properly with McDonald's petitions could be so great as to justify the step we now take. Indeed, the time that has been consumed in the preparation of the present order barring the door to Mr. McDonald far exceeds that which would have been necessary to process his petitions for

the next several years at least. I continue to find puzzling the Court's fervor in ensuring that rights granted to the poor are not abused, even when so doing actually *increases* the drain on our limited resources. Cf. *Brown* v. *Herald Co.*, 464 U. S. 928 (1983) (BRENNAN, J., dissenting). Today's order makes sense as an efficiency measure only if it is merely the prelude to similar orders in regard to other litigants, or perhaps to a generalized rule limiting the number of petitions *in forma pauperis* an individual may file. Therein lies its danger.

The Court's order itself seems to indicate that further measures, at least in regard to this litigant, may be forthcoming in the future. It notes that McDonald remains free to file *in forma pauperis* for relief other than extraordinary writs, if he "does not similarly abuse that privilege." *Ante*, at 6. But if we have found his 22 petitions for extraordinary writs abusive, how long will it be until we conclude that his *32* petitions for certiorari are similarly abusive and bar that door to him as well? I am at a loss to say why, logically, the Court's order is limited to extraordinary writs, and I can only conclude that this order will serve as precedent for similar actions in the future, both as to this litigant and to others.

I doubt—although I am not certain—that any of the petitions Jessie McDonald is now prevented from filing would ultimately have been found meritorious. I am most concerned, however, that if, as I fear, we continue on the course we chart today, we will end by closing our doors to a litigant with a meritorious claim. It is rare, but it does happen on occasion that we grant review and even decide in favor of a litigant who previously had presented multiple unsuccessful petitions on the same issue. See, *e. g.*, *Chessman* v. *Teets*, 354 U. S. 156 (1957); *see id.*, at 173–177 (Douglas, J., dissenting).

This Court annually receives hundreds of petitions, most but not all of them filed *in forma pauperis*, which raise no colorable legal claim whatever, much less a question worthy

of the Court's review. Many come from individuals whose mental or emotional stability appears questionable. It does not take us long to identify these petitions as frivolous and to reject them. A certain expenditure of resources is required, but it is not great in relation to our work as a whole. To rid itself of a small portion of this annoyance, the Court now needlessly departs from its generous tradition and improvidently sets sail on a journey whose landing point is uncertain. We have long boasted that our door is open to all. We can no longer.

For the reasons stated in *Brown* v. *Herald Co.*, *supra*, I would deny the petition for a writ of habeas corpus without reaching the merits of the motion to proceed *in forma pauperis*. For the reasons stated above, I dissent from the Court's order directing the Clerk not to accept future petitions *in forma pauperis* for extraordinary writs from this petitioner.

TENNESSEE STATE STATUTE

20-12-127. PAUPER'S OATH-DIVORCE ACTIONS.

(a) Except for false imprisonment, malicious prosecution, slanderous words, and for absolute divorce, any resident of this state may commence an action without giving security as above required by taking and subscribing the following oath in writing: "I_____,do solemnly swear, that owing to my poverty, I am not able to bear the expense of the action which I am about to commence, and that I am justly entitled to the relief sought, to the best of my belief."

(b) In suits for absolute divorce brought by a spouse unable to give bond, the clerks of the various courts having jurisdiction in such cases may accept, in lieu of such bond and security for costs, a cash deposit, not to exceed

ten dollars($10.00), which shall be applied to the partial payment of the costs of the officers of the court in the order in which they accrue; and provided that if the costs in the case can be collected by execution from the defendant, the amount so deposited by the petitioner shall be refunded to such petitioner.

(c) Suits for divorce from bed and board may be prosecuted in forma pauperis.

IN THE CHANCERY COURT FOR DAVIDSON COUNTY,
AT NASHVILLE, TENNESSEE
PART ONE

JESSIE D. MCDONALD, Appellant-Defendant, Cross-Complainant, vs. YELLOW CAB METRO,INC., Appellee-Plaintiff, Cross-Defendants.	)	**FILED:** **Jan. 4,1988** No. 87-76-I

AMENDMENT TO NOTICE OF APPEAL

The Defendant and Cross-Complainant, Jessie D. McDonald, hereby amends his Notice of Appeal, to comply with Rule 3(f) of Tennessee Rules of Appellate Procedure, as follows:

The Defendants, Jessie D. McDonald, individually, d/b/a McDonald Enterprises, and Yellow Cab Company,Inc., and Yellow Cab Co.,Inc. of Nashville and Franklin, are taking the appeal from the final judgment, entered on December 28th.,1987,

to the Tennessee Court of Appeals, for the Middle District Division of Tennessee.

This being the 4th., day of January, 1988.

Jessie D. McDonald
P.O. Box 5724
2134-14th. Ave. North
Nashville, Tenn. 37208
(615) 256-3434

APPEAL BOND

CASE FILE NO.
STATE OF TENNESSEE 87-76-I
DAVIDSON COUNTY CHANCERY COURT

JESSIE D. MCDONALD, et. al.,
Appellant,

vs.

YELLOW CAB METRO,INC.,
Appellee.

Appeal to Court of Appeals

POOR PERSON'S OATH

I, the undersigned appellant, do solemnly swear that I am a resident of the State of Tennessee, and that owing to my poverty, I am not able to bear the expense of an appeal, and I am justly

entitled to the relief sought to the best of my belief.

JESSIE D. MCDONALD

Sworn to & Subscribed
Before me this Date:

December 17, 1987 **By:Fran Lovell,**
Deputy Clerk &
Master

RULE 18, OF TENNESSEE RULES OF APP. PROC.

APPEALS BY POOR PERSONS

(a) Parties previously permitted to proceed as poor persons in the trial court. A party who has been permitted to proceed in an action in the trial court (which includes a person who has been permitted to proceed there as one who is financially unable to obtain adequate defense in criminal case) may proceed on appeal as a poor person unless, before or after the appeal is taken, the trial court finds the party is not entitled so to proceed, in which event the trial court shall state in writing the reasons for such finding.

(b) Leave to Proceed as a Poor Person on Appeal. Except as provided in (a), a party to an action in the trial court who desires

to proceed as a poor person on appeal shall seek leave so to proceed in the trial court. If leave to proceed as a poor person is granted, the party may proceed without further application in the appellate court and without prepayment of fees or costs in either court or the giving of security therefor. If leave is denied, the trial court shall state in writing the reasons for the denial.

(c) Subsequent Proceedings on Denial of Leave to Proceed as a Poor Person.

If leave to proceed as a poor person is denied, or the trial court finds that the party is not entitled so to proceed, the clerk of the trial shall forthwith serve notice of such action. A motion for leave to proceed as a poor person may be filed in the appellate court within 30 days after service of the notice of the action of the trial court. The motion shall be accompan-

ied by copies of the papers filed in the trial court seeking leave to proceed as a poor person and by a copy of the statement of reasons given by the trial court for its action.

(d) Appointment of Counsel in Criminal Actions.

In a criminal action, on overruling a motion for new trial or in arrest of judgment, whichever is later, the trial court shall advise the defendant and appoint counsel on appeal as provided in rule 37(c) of Tennessee Rules of Criminal Procedure.

IN PART ONE OF CHANCERY COURT, FOR DAVIDSON COUNTY, AT NASHVILLE, TENNESSEE

JESSIE D. MCDONALD, Cross-Plaintiff, vs. LOUIS BELL and YELLOW CAB METRO, INC., Cross-Defendants.	No. 87-76-I

VERBAL ORDER

This matter came on and was heard in open court, on the Cross-Plaintiff, Jessie D. McDonald's oral Motion for Leave to file a cross-complaint in forma pauperis, in the above styled cause.

Upon the court hearing testimony by McDonald, it is the opinion of this court that he should be allowed to so proceed.

It is therefore, ORDERED, DECREED and ADJUDGED, that the clerk of this Court

shall accept the said cross-complaint and file it.

Entered: February 2nd., 1987.

IRVIN H. KILCREASE, Jr.,
Chancellor